No. 02-1093

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

CITY OF SAN DIEGO;
MT. SOLEDAD MEMORIAL ASSOCIATION, INC.,
Petitioners,

v.

PHILIP K. PAULSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. CERTIORARI JURISDICTION IS ENTIRELY PROPER AND WARRANTED IN THIS CASE 1

A. The Ninth Circuit Violated The *Erie* Doctrine 2

1. East Bay *Asian* Establishes That There Cannot Be A No Aid Clause Violation In This Case 2

2. The Ninth Circuit's Unprecedented Expansion Of The No Aid Clause Is A Violation Of the *Erie* Doctrine 5

II. THE CITY'S FAIR MARKET VALUE SALE TO THE HIGHEST BIDDER DOES NOT VIOLATE THE NO AID CLAUSE 6

A. The Property Was Made Equally Available To All Potential Bidders 6

B. The Ninth Circuit's Strict Economic Analysis Is Entirely Misguided 6

C. The Cross Is And Always Has Been Owned By The Association 7

D. The Cross Is Not Inextricably Intertwined With Any Religious Message 8

E. The Association Is A Secular Organization Whose Purpose Does Not Involve Religion 9

III. THE STATE CONSTITUTION CANNOT EVISCERATE PROTECTIONS UNDER THE FEDERAL CONSTITUTION 9

CONCLUSION 10

TABLE OF AUTHORITIES

Federal Cases

Erie Railroad Co. v. Tompkins
304 U.S. 64, 78 (1938) 1, 2, 5

Kong v. City and County of San Francisco
18 Fed. Appx. 616 (9th Cir. 2001) 3

Lemon v. Kurtzman
403 U.S. 602, 612-613 (1971) 10

Newdow v. U.S. Congress
292 F.3d 597 (9th Cir. 2002) 1

Pennsylvania v. Ritchie
480 U.S. 39, 48, fn.7 (1987) 8

California Cases

California Educational Facilities Authority v. Priest
12 Cal. 3d 593, 596, 604 (1974) 9

East Bay Asian Local Development Corporation v. State of California, 24 Cal. 4th 693, 719 (2000) 2, 3

CONSTITUTION

California Constitution (No Aid Clause)
Article XVI, section 5 ..... 2, 4, 5, 7, 8, 9, 10

STATUTE

Civil Code sections 1013, 1013.5, 1019 8

I. CERTIORARI JURISDICTION IS ENTIRELY PROPER AND WARRANTED IN THIS CASE

Review of this case is warranted because the Ninth Circuit's en banc ruling raises significant federal questions that need to be addressed by this Court. These important federal questions fall squarely within this Court's discretion to review matters under Rule 10. First and foremost, the Ninth Circuit's failure to properly interpret state law violates a fundamental federal principle, the *Erie* doctrine. *See* Para. I.A, *infra*.

The Ninth Circuit's interpretation of state law is flawed because a fair market value sale to the highest bidder simply does not constitute aid under the No Aid Clause. *See* Para. II, *infra*. This is especially true where the highest bidder is the Mt. Soledad Memorial Association (Association), a secular organization whose purpose and mission has nothing to do with religion or religious purposes. In reaching such a far-fetched conclusion–finding aid to religious purposes where there is none- the Ninth Circuit has repeatedly demonstrated its hostility to religion and religious viewpoints.[1]

Moreover, the Ninth Circuit's broad interpretation of the state No Aid Clause violates rights guaranteed under the federal Constitution by requiring that the City discriminate on the basis of religious viewpoint.

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[1]In perhaps one of the most controversial cases in recent history, the Ninth Circuit held the phrase "under God" in the National Pledge of Allegiance unconstitutional. *Newdow v. U.S. Congress (Newdow I)*, 292 F.3d 597 (9th Cir. 2002). Most recently, despite a vehement dissent from several judges, a majority of the Ninth Circuit adamantly refused to grant en banc review of this decision. *Newdow v. U.S. Congress (Newdow II)*, 3 Cal.Daily.Op.Serv. 1724 (9th Cir. 2003).

A. The Ninth Circuit Violated The *Erie* Doctrine

By failing to properly interpret state law, the Ninth Circuit contravened a fundamental principle of federal law, the *Erie* doctrine, which provides the foundation for relations between federal and state courts. *Erie* requires that federal courts deciding state law questions are to apply the law of the state as set forth in state statutes, regulations, judicial precedents, and other sources of law. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Most basically, a federal court deciding a state law question is to decide the issue the way the state Supreme Court would.

It is difficult to fathom how the Ninth Circuit could adhere to this fundamental principle when it deliberately omits any substantive analysis of *East Bay Asian Local Dev. Corp. v. State of California*, 24 Cal.4th 693 (2000), the most recent pronouncement of the California Supreme Court on the No Aid Clause. The Ninth Circuit is simply not at liberty to pick and choose which state law precedents it wishes to apply and cavalierly interpret them to support a predetermined outcome.

1. *East Bay Asian* Establishes That There Cannot Be A No Aid Clause Violation In This Case

East Bay Asian stands for the proposition that governmental action to simply step out of the way of religion does not constitute a violation of the No Aid Clause.[2] *East Bay Asian*, 24 Cal. 4th at 717. As they must,

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[2] The California Supreme Court's holding represents a marked shift from prior applications of the No Aid Clause by recognizing that substantial benefits can accrue to religion and religious groups so long as government seeks to avoid federal constitutional violations such as

Respondent concurs with this reading of the case. (Resp., p. 15).

Nevertheless, Respondent disingenuously attempts to distinguish *East Bay Asian* by arguing that "the entire point of the transaction in the case at bar was to *transform* the status of the property from a government-endorsed religious display to a privately-held memorial." *Id.* It is contradictory and self-serving for Respondent to argue that such a transformation results in the inapplicability of *East Bay Asian* when such a consequence has been forced upon the City through his relentless litigation. The transparency of Respondent's argument reveals that his one and only aim is and has always been to see that the cross is permanently removed or destroyed. Unless his desired outcome is achieved, Respondent has demonstrated through protracted litigation in this case that he will never be satisfied.

More importantly, Respondent's argument misses the point and fails to distinguish the facts of the instant case from *East Bay Asian*. The aim of the transaction was to transform the property from government to private ownership. However, this does not negate the fact that the City's purpose was to step out of the way of religion. In fact, the City remained scrupulously neutral towards religion by explicitly permitting the successful bidder full discretion to maintain or remove the cross. This fact is further illustrated by a comparison of the sale of public land surrounding a cross in the instant case to the one in San Francisco.[3]

Although Respondent touts the City of San Francisco's sale of the land and cross atop Mt. Davidson as

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burdening *potential* free exercise rights. *East Bay Asian*, 24 Cal.4th at 710.

[3] This case is *Kong v. City and County of San Francisco*, 18 Fed.Appx. 616 (9th Cir. 2001).

constitutionally permissible under the No Aid Clause, that sale offered bidders wishing to maintain the cross a significant advantage over bidders wishing to remove it. (Respondent, p. 16, fn. 9). Because of the open space restriction that San Francisco placed on the property,[4] a successful bidder could only maintain either a cross or open space on the auctioned property. Rather than remain scrupulously neutral towards religion, the Mt. Davidson sale entirely prohibited those wishing to espouse viewpoints other than those represented by the cross. As a result, a prospective bidder wishing to remove the cross would find little value in bidding on land that he or she could only maintain as open space. On the other hand, the City's sale here permitted the successful bidder discretion to erect either a religious or secular war memorial. In this way, the City's sale was inclusive of views of both religious and non-religious bidders, affording everyone an equal opportunity to bid on the auctioned property.[5]

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[4] Respondent erroneously characterizes the San Francisco case as imposing no use restriction upon the auctioned property. (Resp., p.16, fn.9). Actually, however, San Francisco imposed an open space restriction, which only permitted a successful bidder to maintain the cross or open space on the property. (Ass'n ER 34). The San Francisco Invitation to Bid specifically states: "Property may be used only for open space in its natural, scenic condition. . . No *new* buildings or other structures may be constructed on the Property." (Emphasis added). *Id.*

[5] Moreover, despite Respondent's affirmation of the Mt. Davidson sale, under the Ninth Circuit's strained interpretation of the No Aid Clause, the conveyance of the cross in that case would still render it constitutionally infirm. The successful bidder wishing to remove the cross would still have to bear the cost of removal. Therefore, Respondent's suggestion that the City should offer to deliver the property with or without the cross at the buyer's direction does not alleviate the constitutional infirmity under the Ninth Circuit's analysis. (Resp., p. 25). Likewise, Respondent's suggestion that the City could offer the winning bidder a set amount of financial assistance to either construct a new memorial or improve the existing one is without merit. *Id.* As evidenced by Respondent's approval of the Mt. Davidson sale, there is no

2. The Ninth Circuit's Unprecedented Expansion Of The No Aid Clause Is A Violation Of The *Erie* Doctrine

The Ninth Circuit's unilateral decision to elevate the state No Aid Clause as the singular centerpiece of this litigation and to improperly expand its scope constitutes an *Erie* violation. Heretofore, no other court, state or federal, has ever applied the No Aid Clause in the manner that the Ninth Circuit did.[6] Respondent does not refute the veracity of this statement. (Resp., p. 11). Its significance lies in the fact that the interpretation of and significance accorded to state law is to be dictated by state courts, not federal courts. According to the *Erie* doctrine as pronounced by the United States Supreme Court, the role of federal courts is simply to faithfully apply state law as determined by state precedent and as the state Supreme Court would.

Despite now emphasizing the significance of the No Aid Clause (Resp., p. 12), Respondent omitted any reference to it whatsoever in his petition for en banc rehearing. Consequently, the City's answer to the petition did not rebut any arguments regarding the No Aid Clause because none were raised. The tangential significance of the No Aid Clause in this litigation is evidenced by the fact that the en banc panel of the Ninth Circuit requested supplemental briefing on issues other than the No Aid Clause. Likewise, no questions were raised concerning the No Aid Clause

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requirement, constitutional or otherwise, that the City be required to offer financial assistance to prospective purchasers to fund an entirely private enterprise. In fact, to do so, would create federal Establishment Clause issues by virtue of the City's entanglement.

[6] The en banc majority of the Ninth Circuit admits as much by stating that "[n]either the California Supreme Court nor any California Court of Appeal has considered the application of article XVI, section 5, to facts resembling those presented in this case. . ." App. 11a.

during oral argument. Only after the en banc majority rendered its baseless decision hostile to the Free Exercise Clause and the *Erie* doctrine did the No Aid Clause become singularly significant.

II. THE CITY'S FAIR MARKET VALUE SALE TO THE HIGHEST BIDDER DOES NOT VIOLATE THE NO AID CLAUSE

Respondent admits, as he must, that a fair market value transaction to the highest bidder does not run afoul of the No Aid Clause. (Resp., p. 16). Nevertheless, Respondent summarily dismisses this "uncontested principle." *Id.* In doing so, Respondent, like the Ninth Circuit, ignores the plain facts of this case.

A. The Property Was Made Equally Available To All Potential Bidders

Although Respondent claims that the property was not made equally available to all potential bidders, the open bid process that the City employed belies that contention. Forty-two interested parties requested bid packets and five groups submitted actual bids. Of these five groups, two were from religious organizations, two were from atheist organizations, and the other was from the Association, a secular veteran's group. The land was sold as-is and the City's bid invitation repeatedly stated that the successful bidder had the discretion to retain or remove the cross. At the conclusion of the process, the sale was awarded to the highest bidder who paid fair market value for the entire auctioned parcel which included the cross.[7]

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[7] None of the bidders, only Respondent who never participated, complained about bias in the process. Even then, Respondent did not do so until the sale was completed and the outcome contrary to his liking.

B. The Ninth Circuit's Strict Economic Analysis Is Entirely Misguided

The sole basis for the Ninth Circuit's contention that the bid process conferred a benefit for religious purposes involves a strict one-sided economic analysis that the bidder wishing to remove the cross would have to incur the cost of removal and erection of an alternative memorial. However, the Ninth Circuit failed to consider the fact that the cost of maintaining an almost 50-year old, 43-foot tall, 24-ton cross could very possibly exceed the cost of demolishing it and maintaining a very modest war memorial such as a bronze plaque or rose garden. In such a case, there would be absolutely no financial benefit in maintaining the cross (but rather a financial detriment) and as such, there could not conceivably be a No Aid Clause violation. Respondent altogether fails to address this glaring weakness in the Ninth Circuit's misguided economic analysis.

Moreover, the Ninth Circuit falsely assumed that a bidder wishing to remove the cross would be required to set aside a certain amount in reserves to fund dismantling of the cross. In reality, the bids were evaluated on the basis not only of current reserves, but also the demonstrated ability to fund-raise. (Ass'n ER, pp. 111-120). Rather than employ a static economic analysis of the sale, the Ninth Circuit should have properly considered a dynamic approach--one in line with reality and the facts of this case. That is, any bidder, regardless of their desire to maintain or remove the cross, was able to equally bid to the full extent of their reserves so long as they could demonstrate the ability to raise funds.[8]

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[8] Because no time frame was ever imposed by the City regarding exactly when the war memorial needed to be erected, any successful bidder could raise funds to do so in due course.

C. The Cross Is And Always Has Been Owned By The Association

The cross was erected and owned by the Association since 1954. App. 92a, 98a. Although the cross was to be conveyed with the sale of the land, the Association was conferred no governmental benefit by its inclusion in the sale because the Association had paid for the erection of the cross in the first instance, continued to own it throughout. App. 92a, 98a. Because the Association was the highest bidder, it never executed the quitclaim deed which would have conveyed its interest in the cross.

Through a misunderstanding of the law regarding fixtures, Respondent contests the fact that the cross has been owned by the Association. (Resp., p.19, fn.11). The plain language of Civil Code section 1013 cited by Respondent, however, clearly allows individuals to remove their fixtures from another's property. Moreover, other sections in the same chapter allow fixtures to be removed and kept by the person affixing them. *See* Cal. Civil Code §§1013.5 and 1019.

D. The Cross Is Not Inextricably Intertwined With Any Religious Message

In the context of a veteran's memorial maintained and owned by a secular veteran's group, the cross does not symbolize Christian values. Here, the lack of Christian sentiment expressed by the cross is especially true because each plaque dedicated to the memory of our nation's war heroes contains a separate symbol of faith (or lack thereof, i.e. atheist symbol) chosen by the plaque donors.

Respondent characterizes case law precedent regarding the Latin cross as the principal symbol of Christianity as "the law of the case." (Resp., p. 17). However, the law of the case doctrine is not a bar to this

Court's jurisdiction to review this flawed premise. *Pennsylvania v. Ritchie*, 480 U.S. 39, 48, fn.7 (1987). An objective reasonable observer viewing this particular setting would understand that the cross simply represents peace, solemnity, and the passage of life. In this way, there is no violation of the No Aid Clause because no religious purpose is involved in any transaction involving the cross.

E. The Association Is A Secular Organization Whose Purpose Does Not Involve Religion

For there to be a violation of the No Aid Clause, any governmental aid must be properly characterized as having a "direct, immediate, and substantial effect of promoting religious purposes." *Calif. Educ. Facilities Authority v. Priest*, 12 Cal.3d 593, 605, fn. 12. By its plain language, the No Aid Clause only applies to sectarian religious purposes. To the extent that the Association is involved in any matter that can even be considered sectarian or religious, such activity is clearly incidental to their primary role as a secular veteran's organization. Therefore, any governmental aid in furtherance of religion would likewise be incidental. Consequently, no impermissible aid to religion exists.

III. THE STATE CONSTITUTION CANNOT EVISCERATE PROTECTIONS UNDER THE FEDERAL CONSTITUTION

Rather than substantively analyze the violations of the Association's federal constitutional rights under the First and Fourteenth Amendments engendered by the en banc majority's strained analysis in this case, Respondent offers off-handed, quick fix "solutions".

As set forth earlier, Respondent's "solutions" and their failure to remedy the alleged constitutional infirmity simply underscore the problematic basis of the Ninth

Circuit's ruling. *See* p.5, fn 5, *supra*. Proper consideration of the practical consequences of the ruling as previously discussed at length in the City's Writ Petition reveals that the Ninth Circuit's unprecedented expansion of state constitutional rights under the No Aid Clause violates the First and Fourteenth Amendments of the U.S. Constitution.

Furthermore, Respondent erroneously disavows any parallels between the state No Aid Clause and the federal Establishment Clause indicating that the two are part of one test despite a California Supreme Court case, two attorney general opinions, and two United States Supreme Court decisions to the contrary. (Resp., pp. 12-13; City, p.11). Although Respondent summarily dismisses the attorney general opinions, he altogether fails to address the California and United States Supreme Court opinions.

In the final analysis, the federal Establishment Clause itself represents a delicate balance demanding government impartiality in the field of religion. In particular, government may neither advance *nor inhibit religion*. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (Emphasis added). To weigh too heavily on one side, as the Ninth Circuit as done here with its expansive reading of the No Aid Clause, is to unconstitutionally tip the balance.

CONCLUSION

THEREFORE, Petitioner CITY OF SAN DIEGO requests that this Court GRANT Certiorari in this case.

RESPECTFULLY SUBMITTED,

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